

Request for preliminary adoption of new rules in 312 IAC 9.5 to establish an option for an in-lieu fee to mitigate adverse impacts to fish, wildlife, or botanical resources for activities authorized by a permit issued by the Division of Water under IC 14-16-2, IC 14-28-1 or IC 14-29-1; Administrative Cause No. 13-088W. Review of and possible action on proposed nonrule policy document of providing standards for administration of in-lieu fee; Administrative Cause No. 13-107W

The Division of Fish and Wildlife is proposing to add rules that would establish a new option for mitigation for permits from the DNR for Construction in a Floodway, Construction in or along the shoreline of a Public Freshwater Lake, and Construction in a Navigable Waterway. State law requires reviews of these permit applications for impacts to fish, wildlife, and botanical resources. Typically, mitigation is done on or near the project site, or at least within the watershed. Mitigation plans are often submitted that restore and establish habitat as the result of a project and includes monitoring for a period of three (3) to ten (10) years.

With these new rules, mitigation plans would provide one of three options:

- (1) The establishment, restoration, or a combination of the establishment and restoration of habitat for fish and wildlife resources by the applicant.
- (2) The use of an approved mitigation bank.
- (3) Payment of an in-lieu fee that provides for the establishment or enhancement of or a combination of the establishment and restoration of habitat for fish or wildlife resources.

The new alternative for a mitigation plan would be through the use of an in-lieu fee as mitigation for impacts to fish, wildlife, or botanical resources. Upon approval by the DNR, as well as IDEM and the US Army Corps of Engineers (if applicable), the applicant would provide payment to the Indiana Natural Resources Foundation. These monies would then be used to establish or restore (or a combination thereof) habitat for fish and wildlife resources.

Included in the rule language in 312 IAC 9.5-3-2 is criteria for evaluating a proposal for in-lieu fee mitigation. Approval may not be given if:

- (1) there are endangered, threatened, or rare species at the project site,
- (2) a rare natural community in that region will be affected, or
- (3) the project site has a floristic quality assessment score of 35 or greater or a mean C-value of 3.5 or greater (meaning a higher quality of plants with little disturbance).

The rare natural communities are listed and described in the draft non-rule policy. The floristic quality assessment is a standardized assessment with criteria and values specific to plants in Indiana. More information is on-line at: <http://www.in.gov/idem/4399.htm> under the Floristic Quality Assessment Section.

Monies received as part of the in-lieu fee program will be designated by region and used to do habitat restoration and/or enhancement within that region of the state. The draft non-rule policy also helps explain the purpose of this program, how it will be administered, and the different natural regions of the state.

This option is especially important for INDOT and businesses that do large-scale projects around the state. Having small mitigation sites scattered throughout the state is not only expensive and labor-intensive, but it may also not result in the best benefit for fish and wildlife resources.

TITLE 312 NATURAL RESOURCES COMISSION

Proposed Rule LSA Document #13-

DIGEST

Adds 312 IAC 9.5 to establish an option for an in-lieu fee to mitigate adverse impacts to fish, wildlife, or botanical resources for activities authorized by a permit under IC 14-26-2, IC 14-28 or IC 14-29-1. Effective thirty days after filing with the Publisher.

312 IAC 9.5

SECTION 1. 312 IAC 9.5 IS ADDED TO READ AS FOLLOWS:

Rule 1. Purpose and Administration

312 IAC 9.5-1-1 Purpose of in-lieu fees

Authority: IC 14-10-2-4

Affected: IC 14-26-2; IC 14-28-1; IC 14-29-1

Sec. 1. (a) This article establishes an option to request an in-lieu fee to mitigate adverse impacts to fish, wildlife, or botanical resources if a permit is required under any of the following:

(1) IC 14-26-2 and 312 IAC 11.

(2) IC 14-28-1 and 312 IAC 10.

(3) IC 14-29-1 and 312 IAC 6.

(b) Mitigation under subsection (a) is made through the payment of funds to:

(1) establish;

(2) restore; or

(3) establish and restore;

habitat for fish or wildlife resources. (*Natural Resources Commission; 312 IAC 9.5-1-1*)

312 IAC 9.5-1-2 Administration of in-lieu fees

Authority: IC 14-10-2-4

Affected: IC 14-26-2; IC 14-28-1; IC 14-29-1

Sec. 2. The department's division of fish and wildlife shall administer this article. (*Natural Resources Commission; 312 IAC 9.5-1-2*)

Rule 2. Definitions

312 IAC 9.5-2-1 Applicability

Authority: IC 14-10-2-4

Affected: IC 14-26-2; IC 14-28-1; IC 14-29-1

Sec. 1. (a) The definitions in this rule apply throughout this article.

(b) The definitions in 312 IAC 1 also apply. (*Natural Resources Commission; 312 IAC 9.5-2-1*)

312 IAC 9.5-2-2 “In-lieu fee” defined

Authority: IC 14-10-2-4; IC 14-28-1-5; IC 14-28-3-2

Affected: 14-26-2, IC 14-28-1, and IC 14-29-1

Sec. 2. “In-lieu fee” means a payment to the Indiana Natural Resources Foundation, to satisfy mitigation requirements under this article. (*Natural Resources Commission; 312 IAC 9.5-2-2*)

312 IAC 9.5-2-3 “Mitigation” defined

Authority: IC 14-10-2-4

Affected: 14-26-2, IC 14-28-1, and IC 14-29-1

Sec. 3. “Mitigation” means action to eliminate, lessen, or replace the loss of environmental benefits and ecological functions if those benefits and functions are disturbed by human activities. (*Natural Resources Commission; 312 IAC 9.5-2-3*)

312 IAC 9.5-2-4 “Mitigation plan” defined

Authority: IC 14-10-2-4; IC 14-28-1-5; IC 14-28-3-2

Affected: 14-26-2, IC 14-28-1, and IC 14-29-1

Sec. 4. “Mitigation plan” means a document that provides mitigation through any of the following:

- (1) The establishment, restoration, or a combination of the establishment and restoration of habitat for fish or wildlife resources.**
- (2) The use of an approved mitigation bank.**
- (3) Payment of an in-lieu fee. (*Natural Resources Commission; 312 IAC 9.5-2-4*)**

Rule 3. Processing in-lieu fee mitigation requests

312 IAC 9.5-3-1 Permit applicant request for in-lieu fee

Authority: IC 14-10-2-4

Affected: IC 14-26-2, IC 14-28-1; IC 14-29-1

Sec. 1. (a) A person that applies for a permit under IC 14-26-2, IC 14-28-1, or IC 14-29-1 may propose to use in-lieu fee under this article.

(b) A person must submit the request on a departmental form to the division of fish and wildlife.

(c) The request must be commensurate with the amount and type of impact that is associated with the permit and must include the following information:

- (1) Steps taken to avoid and offset or minimize impacts at the project site.**
- (2) The reasons for a request to use an in-lieu fee compared to other mitigation, including an explanation of the inability to do mitigation on-site or within the same 8-digit hydrologic unit code area.**
- (3) A floristic quality assessment of the project site.**
(Natural Resources Commission; 312 IAC 9.5-3-1)

312 IAC 9.5-3-2 Department evaluation of in-lieu fee request

Authority: IC 14-10-2-4

Affected: IC 14-26-2, IC 14-28-1; IC 14-29-1

Sec. 2. (a) The department shall review a request for an in-lieu fee based on the following:

- (1) The size and location of a project.**
- (2) Steps the permit applicant proposes to avoid and minimize or offset impacts to fish, wildlife, or botanical resources.**
- (3) Quality or rareness of habitat to be impacted.**
- (4) The level of impact to fish, wildlife, or botanical resources.**
- (5) The fee is an amount approved by the commission.**

(b) The department may not approve in-lieu fee mitigation if:

- (1) an endangered, threatened, or rare species listed at 15 IR 1312 in the Roster of Indiana Animals and Plants that are Extirpated, Endangered, Threatened, or Rare exists at the project site.**
- (2) a rare natural community in that region will be affected.**
- (3) the project site has a floristic quality assessment score of thirty-five (35) or greater or a mean C-value of three and one-half (3.5) or greater.**

(c) The department may recommend modifications to a request for an in-lieu fee. *(Natural Resources Commission; 312 IAC 9.5-3-2)*

312 IAC 9.5-3-3 Department action on in-lieu fee request

Authority: IC 14-10-2-4

Affected: IC 14-26-2, IC 14-28-1; IC 14-29-1

Sec. 3. The department may approve, approve with conditions, or deny a request for in-lieu fee mitigation based on the evaluation described in section 2 of this rule. *(Natural Resources Commission; 312 IAC 9.5-3-2)*

Natural Resources Commission
Information Bulletin #

Subject: Administration of In-Lieu Fee

1. Purpose

Permits are required by the Flood Control Act, IC 14-28-1, Lake Preservation Act in IC 14-26-2, and Navigable Waterways Act in IC 14-29-1. State law requires reviews of these permit applications for impacts to fish, wildlife, and botanical resources and mitigation is required to offset or minimize these impacts. Mitigation plans are often submitted that restore and establish habitat as the result of a project and includes monitoring for a period of three (3) to ten (10) years. Typically, mitigation is done on or near the project site, or at least within the watershed.

Mitigation plans could provide one of three options:

- (1) The establishment, restoration, or a combination of the establishment and restoration of habitat for fish and wildlife resources.
- (2) The use of an approved mitigation bank.
- (3) Payment of an in-lieu fee that provides for the establishment or enhancement of or a combination of the establishment and restoration of habitat for fish or wildlife resources.

A new alternative for a mitigation plan would be through the use of an in-lieu fee as mitigation for impacts to fish, wildlife, or botanical resources. Upon approval by the DNR, as well as IDEM and the US Army Corps of Engineers (if applicable), the applicant would provide payment to the Indiana Natural Resources Foundation. These monies would then be used to establish or restore (or a combination thereof) habitat for fish and wildlife resources.

2. Definitions

“In-lieu fee” means a payment to the Indiana Natural Resources Foundation, to satisfy mitigation requirements under IC 14-28-1, IC 14-19-1, and IC 14-26-2.

“Mitigation” means action to eliminate, lessen, or replace the loss of environmental benefits and ecological functions if those benefits and functions are disturbed by human activities.

“Mitigation plan” means a document that provides mitigation through any of the following:

- (1) The establishment, restoration, or a combination of the establishment and restoration of habitat for fish or wildlife resources.
- (2) The use of an approved mitigation bank.
- (3) Payment of an in-lieu fee.

312 IAC 10-2-39 "Unreasonable detrimental effects upon fish, wildlife, or botanical resources" defined
Authority: IC 14-28-1-5; IC 14-28-3-2
Affected: IC 14-27-7; IC 14-28-1; IC 14-28-3

Sec. 39. "Unreasonable detrimental effects upon fish, wildlife, or botanical resources" means damage to fish, wildlife, or botanical resources that is found likely to occur by the director based upon the opinion of a professional qualified to assess the damage and:

- (1) creates a condition where recovery of the affected resources is not likely to occur within an acceptable period; and

(2) cannot be mitigated through the implementation of a mitigation plan approved by the director.

3. Administration

If approved by the DNR, the in-lieu fee payment will be given to the Indiana Natural Resources Foundation. The Indiana Natural Resources Foundation and DNR will establish a review team, in cooperation with other Federal and State resource agencies (if required), to review and approve proposed projects for design and construction with in-lieu fee monies, and perform a yearly review of ongoing and completed projects. Funded projects will directly compensate for impacts to the fish, wildlife, or botanical resources in the region where the impacts took place.

When DNR permits are issued that are conditioned to include the payment of money in lieu of other mitigation, those monies must be used to offset the loss to these resources. These impacts typically result in the physical loss of aquatic habitat, riparian buffers, and related aquatic functions of streams, wetlands, or public freshwater lakes.

The Indiana Natural Resources Foundation may contract with recipients of the monies to complete projects with these funds. Recipients will work with DNR biologists, federal, state, and local agencies, landowners, and other entities to locate potential sites for mitigation projects. Typically, this would include sites containing degraded aquatic habitat, straightened or channelized streams, unstable stream channels, stream segments lacking riparian vegetation and similar impairments. However, not all degraded or impaired streams will qualify as potential mitigation projects that can be funded with in-lieu fee monies. A variety of factors will be evaluated by the review team to determine if a site is a suitable candidate for an in-lieu fee mitigation project. These factors include, but are not limited to, the following:

1. The degree of impairment and functional replacement. Extremely degraded streams (void of aquatic life or nearly so) that have been straightened, channelized, lined with concrete or culverted will usually offer good opportunities for improvements to natural functions and values, and will generally be considered as good candidates for in-lieu fee mitigation projects. Likewise, streams with severe bank erosion, stream segments lacking riparian vegetation, and similar problems will be considered good candidates. Previously impacted stream reaches that have recovered, with respect to habitat, water quality and channel stability, will generally not be considered suitable project sites.
2. Landowner cooperation. In order for a potential project site to be acceptable, the perspective landowner must be receptive to having stream enhancement or restoration work performed on his/her land and must be willing to allow permanent protection (e.g., through a Deed Restriction, Conservation Easement or similar written agreement) of the subject stream corridor.
3. Technical Feasibility and Likelihood of Success. The in-lieu fee mitigation project should focus on natural ecological processes and should be planned and designed to be self-sustaining over time to the extent possible. The work must result in some tangible increase in ecological function and benefit to the stream. Stream reaches where insurmountable problems exist, and where enhancement/restoration would not provide a legitimate improvement, will not be viewed as a suitable site for using in-lieu fee funding. Proposed mitigation techniques need to be well understood and reliable. When uncertainties surrounding the technical feasibility of a proposed mitigation technique exists, the review team may impose special requirements on the recipient and ask for appropriate reporting from the recipient. It may be possible for these special requirements to be phased-out or reduced once the attainment of prescribed performance standards is demonstrated. It shall be the role of the recipient to submit a plan detailing specific performance standards to the review team to ensure that the technical success of the project can be evaluated by the review team.

4. Proximity. As a general rule, proposed in-lieu fee mitigation project sites will be within the same region, river basin, and 8-digit Hydrologic Unit Code (HUC) as the projects generating the in-lieu fee monies. (The US Geological Survey established a national framework for cataloging watersheds of different geographical scales. Each watershed level in the hierarchy is designed using the hydrologic unit cataloging system. At the national level, this system involves an 8-digit code that uniquely identifies four levels of classification: region, sub-region, accounting code, and cataloging unit.) In order to ensure in-kind functional replacement, the in-lieu fee mitigation will generally be performed on streams that are within the same region outlined in this policy and within one stream order of the impacted stream in which permitted in-lieu fee funding was generated (if possible).
5. Impaired Streams. Streams occurring on the EPA 303 (d) list and targeted watersheds as identified by Federal and State agencies will receive a higher priority for use of in-lieu fee monies if the habitat restoration work would ameliorate the impairment and at the same time adequately mitigate for the functions and values lost at impacted sites.
6. Watershed Management. The review team and recipients will attempt to select in-lieu-fee projects within watersheds where other water quality/stream restoration monies (e.g., LARE grants, NRCS programs) have been allocated, when and where such opportunities exist. Whenever possible, in-lieu fee monies will be concentrated within watersheds where a high degree of impairment exists and landowner cooperation is widespread. In-lieu fee mitigation projects will be planned and developed to address the specific resource needs of a particular watershed.

Projects that impact Rare Natural Communities may not be subject to the use of in-lieu fees as an option for a mitigation plan. The list of Rare Natural Communities is as follows:

1. Boreal Flatwoods: Boreal flatwoods is a forested wetland/upland complex formed in level sand plains with poor drainage. Deciduous hardwoods and softwoods dominate.
2. Sand Flatwoods: Sand flatwoods is a forested wetland/upland complex formed in level sand plains with poor drainage. Deciduous hardwoods and softwoods dominate.
3. Southern Lowland Flatwoods: Dry flatwoods are broadleaf deciduous forests of upland sites. There are two mosaic patches. Mosaic patch 1 occurs on well-drained level areas. Mosaic patch 2 occurs in small depressions within the level areas. These depressions are ephemerally wet.
4. Mesic Southwestern Lowland Flatwoods: Mesic Southwestern Lowland flatwoods are broadleaf deciduous forests of level upland sites.
5. Sinkhole Pond: Sinkhole ponds are water-containing depressions, generally smaller than four acres, in karst topography. They normally have open water and marshy borders.
6. Wet Prairie: Wet prairie is an herbaceous wetland dominated by combinations of *Spartina pectinata*, *Calamagrostis canadensis*, and *Carex* spp. Vegetation height is often 2-3 meters.
7. Gravel Wash: Gravel wash communities are plant communities occurring on gravelly substrates along streams and rivers. Shrubs may be present. Ground cover consists of mixed herbs, grasses, and vines. The gravel substrate of the communities described here is composed of limestone and chert.
8. Marl Beach: Marl beach is a fen-like community located on the marly muck shorelines of

lakes.

9. Acid Bog: Acid bog is an acidic wetland of kettle holes in glacial terrain. Bogs can be graminoid (*Carex* and sphagnum) or low shrub (*Chamaedaphne calyculata* and *Betula pumila*). The graminoid bog can be a floating, quaking mat.

10. Circumneutral Bog: Circumneutral bog is a bog-like wetland that receives groundwater. Circumneutral bogs can be a mosaic of tall shrub bog, graminoid bog, and other communities. The graminoid bog often occurs on a quaking or floating mat.

11. Fen: Fen is a calcareous, groundwater-fed wetland. Fens are often a mosaic of grassy areas, sedge areas, grass-sedge areas, graminoid-shrubby cinquefoil, and tall shrub areas.

12. Tamarack Fen: Forested fen is a tree-dominated wetland on organic soil which receives groundwater. Forested fens are often a mosaic of treed areas, tall shrub areas, and herbaceous areas. A tall shrub layer is often well developed in forested fens.

13. Muck Flat: Muck flat is a shoreline and lake community possessing a unique flora of sedges and annual plants, many of which are also found on the Atlantic and Gulf Coastal Plains.

14. Sand Flat: Sand flat is a shoreline and lake community possessing a unique flora of sedges and annual plants, many of which are also found on the Atlantic and Gulf Coastal Plains.

15. Sedge Meadow: Sedge meadow is an herbaceous wetland of stream margins and river floodplains, and lake margins or upland depressions.

16. Panne: Panne is an herbaceous wetland occupying interdunal swales near Lake Michigan.

17. Acid Seep: Acid seep is a bog-like wetland typically found in unglaciated hill regions.

18. Circumneutral Seep: The circumneutral seep (or seep-spring) is a groundwater-fed wetland on organic soil. It is primarily herbaceous with a scattered tree canopy.

19. Bald Cypress Swamp: Bald cypress swamp is a seasonally to permanently inundated wetland of large river bottoms.

20. Sinkhole Swamp: Sinkhole swamp is an unusual and small semi-permanently flooded wetland of limestone (karst) landscapes, in which species of southern swamps grow.

21. Dune and Swale: Dune and swale is an ecological system consisting of a mixture of upland and wetland natural communities, that occur in long, narrow, linear complexes. Natural Communities nearest to Lake Michigan are generally more open (sand prairie and savanna), while those furthest from the Lake are more closed canopy.

4. Project Locations

Monies received as part of the in-lieu fee program will be designated by region and used to do habitat restoration and/or enhancement within that region.

The regions are defined as follows:

1. Lake Michigan Region
2. Northwestern Morainal Region
3. Grand Prairie Region
4. Northern Lakes Region
5. Central Till Plain Entrenched Valley Region
6. Central Till Plain Tipton Till and Bluffton Till Plains/Black Swamp Regions
7. Southwestern Lowlands/ Southern Bottomlands Regions
8. Shawnee Hills/Highland Rim Regions
9. Bluegrass Natural Region

These regions are described in the attached document titled, “The Natural Regions of Indiana.”

Fees will be proposed that incorporate funds for administration, land acquisition, project design, construction (including labor and materials), monitoring, legal fees, contingency costs, long term management, and protection of the site. There will be a minimum and maximum fee for each of the following habitat types within each region, depending upon the quality of the habitat:

1. Riparian Buffer/Non-Wetland Forest (per square feet or acre)
2. Stream (per linear feet)
3. Emergent Wetland (per acre)
4. Scrub-Shrub Wetland (per acre)
5. Forested Wetland (per acre)